**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| **STATE OF OKLAHOMA, et al.,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Case No. 05-CV-00329-TCK-SAJ** |
| | ) | |
| **TYSON FOODS, INC., et al.,** | ) | |
| | ) | |
| **Defendants.** | ) | |

**STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "PETERSON FARMS, INC.'S OPPOSED MOTION FOR LEAVE TO FILE SUR-REPLY ON ITS MOTION TO DISMISS"**

COMES NOW the Plaintiff, the State of Oklahoma, *ex rel.* W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, (hereinafter "the State"), by and through counsel, and in opposition to "Peterson Farms, Inc.'s Opposed Motion for Leave to File Sur-Reply on Its Motion to Dismiss" (hereinafter "Motion for Leave") [Dkt. # 973] states as follows:

Peterson Farms, Inc. ("Peterson") seeks -- by motion filed more than 3 months after the State filed (with leave of Court) its Supplemental Brief [Dkt. # 869] -- leave to file an "over-sized" Sur-Reply[1] regarding its motion to dismiss and / or stay [Dkt. # 75]. A close read of Peterson's untimely Motion for Leave reveals that Peterson merely seeks to rehash and respin points that it has previously argued in its opening brief [Dkt. # 75] and reply briefs [Dkt. # 147 & Dkt. # 149] rather than to bring any new, on-point authority to the Court's attention. In fact, a

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[1] The Local Civil Rules do not provide for "sur-reply" briefs. Peterson's Sur-Reply Brief is in reality a "supplemental brief." *See* LCvR 7.2(h). LCvR 7.2(h) states that "[s]upplemental briefs are not encouraged." LCvR(h) further states that "[s]upplemental briefs shall be limited to ten (10) pages in length unless otherwise authorized by the Court."

review of Peterson's Proposed Sur-Reply reveals that it does not cite to any newly-decided law that would change the outcome of its original motion. Peterson's arguments in favor of dismissal or a stay were without merit when first made, and continue to be without merit now.

There is simply no good reason to allow for another round of briefing on Peterson's original motion. Peterson has already filed briefing totaling 58 pages of argument in support of its original motion (in contrast to the State's 31 pages of argument filed in opposition). The arguments are already adequately presented in the briefs previously submitted by the two sides, and the decisional process will not be aided by permitting Peterson to file another 19 pages of rehashed, respun arguments. Accordingly, Peterson's Motion for Leave should be denied.

## I. Argument

### A. Peterson's Motion for Leave does not state adequate and sufficient grounds to justify another round of briefing on its motion to dismiss / stay

The stated basis for Peterson's Motion for Leave, p. 3, is that "[i]n the Supplemental Brief, the State discounts and confuses Peterson's arguments and positions taken with regard to the operation of the federal Clean Water Act and the Arkansas-Oklahoma Arkansas River Basin Compact on the State's claims in this lawsuit, especially regarding the specific issues of preemption and primary jurisdiction."[2] As to the first assertion, the State's briefing did indeed demonstrate that Peterson's arguments and positions were (and remain) without merit. The entire purpose of briefing is to explain why to the Court the other side's arguments and positions are incorrect. That the State has successfully pointed out the fallacies of Peterson's arguments and

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[2] In its Motion for Leave, pp. 2 & 3, Peterson also makes reference to the State of Arkansas' Motion to Intervene. The State has explained in its response to that Motion that this Court does not have jurisdiction to entertain the State of Arkansas' claims. *See* Plaintiff State of Oklahoma's Response in Opposition to State of Arkansas', ex rel. Mike Beebe, Attorney General, and the Arkansas Natural Resources Commission's 'Motion to Intervene'" [Dkt. # 610]. The fact that the State of Arkansas has filed that Motion does not give rise to a need for additional briefing on Peterson's motion to dismiss / stay.

positions is hardly a reason for additional briefing. Another round of briefing is not going to change the fact that Petersons's arguments and positions are without merit.

As to the second point, the State has plainly not confused Peterson's arguments and positions. Peterson's (meritless) arguments and positions are: (1) that the Clean Water Act ("CWA") pre-empts the State's claims under Oklahoma and federal common law as to the Poultry Integrator Defendants' nonpoint source pollution conduct occurring in Arkansas and causing injury in Oklahoma,[3] (2) that the Arkansas-Oklahoma Arkansas River Basin Compact ("Compact") preempts the State's claims as to the Poultry Integrator Defendants' conduct occurring in Arkansas and causing injury in Oklahoma, and (3) that the State's claims against the Poultry Integrator Defendants should be stayed under the doctrine of primary jurisdiction. There is no confusion about these arguments, and Peterson -- aside from its bald assertion -- identified no such confusion in its Motion for Leave.[4] The State, in its briefing, has squarely confronted each of these arguments and positions and demonstrated in no uncertain terms why Peterson is

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[3] Peterson, correctly, has not taken the position in its moving papers that Oklahoma law claims against the Poultry Integrator Defendants for their point and nonpoint source pollution conduct occurring in Oklahoma and causing injury in Oklahoma are in any way pre-empted by the CWA. *See* Peterson Motion [Dkt. No. 75], pp. 13-16. Likewise, the State has acknowledged in its responsive papers that its Oklahoma and federal common law claims against the Poultry Integrator Defendants for their point source pollution conduct occurring in Arkansas and causing injury in Oklahoma are pre-empted by the CWA. (Of course, *International Paper Co. v. Ouellette*, 107 S.Ct. 805, 814-17 (1987), clearly permits the application of Arkansas law to state law claims against the Poultry Integrator Defendants for their point source pollution conduct occurring in Arkansas and causing injury in Oklahoma.) The sole issue in dispute is whether the State's Oklahoma and federal common law claims against the Poultry Integrator Defendants for their nonpoint source pollution conduct occurring in Arkansas and causing injury in Oklahoma are pre-empted by the CWA, thereby requiring the application of Arkansas law to such claims.

[4] It is revealing that Peterson is raising this assertion only now. Had it felt so strongly about this point, one would assume that Peterson would not have waited 3 months to raise it with the Court.

wrong. Another 19 pages of argument on top of the 58 pages of argument Peterson has already provided the Court is not going to change this fact. All it will precipitate is another round of briefing between the two sides.

LCvR 7.2(h) specifically discourages supplemental briefs, and Peterson's Motion for Leave does not provide adequate and sufficient grounds to justify another round of briefing on its motion to dismiss / stay. At some point the briefing on these issues must end. The State submits that it ought to end before Peterson reiterates its unfounded arguments for yet a third time. Accordingly, Peterson's Motion for Leave should be denied.

**B. The arguments set forth in Peterson's Proposed Sur-Reply are, in any event, meritless**

Peterson's Proposed Sur-Reply does not cite to any newly-decided law that would change the outcome of its original motion to dismiss / stay. Peterson's original motion to dismiss / stay was unfounded at the time it was filed,[5] and remains unfounded now.

**1. The CWA does not pre-empt the State's claims under Oklahoma and federal common law as to the Poultry Integrator Defendants'**

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[5] The State incorporates by reference "Plaintiff's Response in Opposition to 'Peterson Farms, Inc.'s Motion to Dismiss and, or in the Alternative, Motion to Stay Proceedings Pending Appropriate Regulatory Agency Action'" [Dkt. # 134], and "State of Oklahoma's Supplemental Brief in Opposition to Peterson Farms, Inc.'s Motion to Dismiss and Alternative Motion to Stay the Proceedings" [Dkt. # 869]. Other briefing also addresses the issues raised by Peterson. *See, e.g.*, "State of Oklahoma's Response in Opposition to 'Cobb-Vantress, Inc.'s Motion to Dismiss Counts Four, Six, Seven, Eight, Nine and Ten of the First Amended Complaint or Alternatively to Stay the Action'" [Dkt. #133], "State of Oklahoma's Supplemental Brief in Opposition to 'Cobb-Vantress, Inc.'s Motion to Dismiss Counts 4,6,7,8, 9 and 10 of the First Amended Complaint or Alternatively to Stay the Action'" [Dkt. #868], "State of Oklahoma's Memorandum in Opposition to 'Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint'" [Dkt. #129], and "State of Oklahoma's Supplemental Brief in Opposition to 'Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint'" [Dkt. #870].

**nonpoint source pollution conduct occurring in Arkansas and causing injury in Oklahoma**[6]

In its Proposed Sur-Reply, Peterson does not cite to a single authority, let alone a newly-decided authority, holding that the CWA pre-empts the application of the affected state's state law or federal common law to interstate nonpoint source pollution claims. That is because Peterson's contention is unfounded.

The basis of Peterson's CWA pre-emption argument -- its assertion that "the reach of the CWA is comprehensive, applying both to point sources and nonpoint sources" -- is simply wrong. Proposed Sur-Reply, p. 4 (emphasis added). As detailed in the State's previous filings, the truth of the matter is that the CWA does not regulate nonpoint source pollution. *See American Wildlands v. Browner*, 260 F.3d 1192, 1197-98 (10th Cir. 2001) ("In the Act, Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution. . . . [T]he Act nowhere gives the EPA the authority to regulate nonpoint source discharges"); *Defenders of Wildlife v. EPA*, 415 F.3d, 1121, 1124 (10th Cir. 2005) ("Congress clearly intended the EPA to have a limited, non-rulemaking role in the establishment of water quality standards by states") (citation and quotations omitted). The EPA agrees that it has no such authority. *See, e.g.*, 65 Fed. Reg. 43586, 43650 (July 13, 2000) ("The CWA preserves the rights of States to experiment with alternative regulatory (and non-regulatory) approaches to control nonpoint sources of pollution. The CWA does not provide specific legal authority for EPA to regulate nonpoint sources in a way that would assure the attainment of water quality standards. Such authority is

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[6] In its Proposed Sur-Reply, Peterson is not as precise in its language as to the scope of its motion as it was in its original motion to dismiss / stay. To be clear, and as pointed out above, in its original motion to dismiss / stay Peterson sought dismissal on CWA pre-emption grounds only as to the State's Oklahoma and federal common law claims directed at pollution originating in Arkansas and causing injury in Oklahoma (i.e., interstate pollution). *See* Peterson Motion [Dkt. No. 75], pp. 13-16.

reserved for the States"). Thus, unlike point source pollution regulation -- for which the CWA sets out a federal regulatory program which states, with EPA approval, can implement and manage -- the CWA has no comparable regulatory program for nonpoint source pollution. Regulation of nonpoint source pollution is left to the states. Simply put, CWA regulation of nonpoint source pollution is not only not "comprehensive," it is non-existent.

Provisions of the CWA pertaining to the development of Total Maximum Daily Loads ("TMDLs") and water quality standards do not constitute a mandatory, comprehensive federal regulatory scheme for nonpoint source pollution. TMDLs are planning mechanisms designed to help attain state water quality standards. TMDLs do not create any new federal regulatory authority over any types of sources. Rather, with regard to nonpoint sources, TMDLs are simply a source of information.[7] The CWA does not give EPA authority to regulate nonpoint sources in

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[7] *See, e.g., City of Arcadia v. U.S. Environmental Protection Agency*, 265 F.Supp.2d 1142, 1144-45 (N.D. Cal. 2003) ("TMDLs established under Section 303(d)(1) of the CWA function primarily as planning devices and are not self-executing"); *Sierra Club v. Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002) ("The Act generally leaves regulation of non-point source discharges [sic] through the implementation of TMDLs to the states"); *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1096-97 (9th Cir. 1998) ("Nonpoint source pollution is not regulated directly by the Act . . . . [T]he Act provides no direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task") (citations omitted); *EPA: Water Quality Standards Handbook*, p. 4-8 (2nd ed. 1994) ("Section 131.12(a)(2) [of 40 C.F.R.] does not mandate that states establish controls on nonpoint sources. The Act leaves it to the States to determine what, if any, controls on nonpoint sources are needed to provide for attainment of State water quality standards"); *Natural Resources Defense Council v. EPA*, 915 F.2d 1314, 1318 (9th Cir. 1990) ("Section 319 does not require states to penalize nonpoint source polluters who fail to adopt best management practices; rather it provides for grants to encourage the adoption of such practices"); 33 U.S.C. § 1329(b) (no requirement that a state management program include regulatory limits on nonpoint sources). *See also* EPA Watershed Academy Web, *Introduction to the Clean Water Act*, p. 31 ("TMDLs do not create any new federal regulatory authority over any type of sources. Rather, with regard to nonpoint sources, TMDLs are simply a source of information [for answering questions] . . ."); p. 34 ("CWA Section 319 created a federal program that provides money to states, tribes, and territories for the development and implementation of programs aimed at reducing pollution from 'nonpoint' sources of pollution. The CWA provides no federal regulatory authority over nonpoint sources, in contrast to point sources"); pp. 50-1 ("Congress

light of a TMDL, nor does it delegate power to the states to do so. This is because, as explained above, the CWA does not regulate nonpoint source pollution, and therefore there are no regulations under the CWA pertaining to nonpoint source pollution to be delegated to the states. Thus, concepts of "cooperative federalism" do not come into play with respect to nonpoint source pollution (for which there is no delegated regulatory program), and the delegated regulatory cases cited by Peterson are entirely off-point.[8 & 9] In sum, Peterson's argument fails because (1) the CWA does not regulate nonpoint source pollution, (2) as such, there is no regulatory authority delegated to the states under the CWA as to nonpoint source pollution (i.e., no so-called "cooperative federalism"), and (3) as such, there is no potential for federal pre-emption. Against this backdrop, it is nonsensical to argue that as to nonpoint source pollution the CWA "is 'sufficiently comprehensive to make reasonable the inference that Congress 'left no

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chose not to address nonpoint sources through a regulatory approach, unlike its actions with 'point' sources. Rather, when it added Section 319 to the CWA in 1987, it created a federal grant program that provides money to states, tribes, and territories for the development and implementation of NPS management programs"); p. 51 ("Though there is no CWA federal regulatory authority over nonpoint sources of pollution and the Act does not require states to develop their own regulatory programs in order to obtain 319 grants, states, territories, and tribes may, at their discretion, use 319 funds to develop their own NPS regulatory programs") (Exhibit 1; also may be found at www.epa.gov/watertrain/cwa).

[8] Peterson states that "the State effectively agrees with the general premise noted above that, 'once the state voluntarily accepts the conditions imposed by Congress, the Supremacy Clause obliges it to comply with federal requirements.'" Proposed Sur-Reply, p. 8. Whether the State agrees or disagrees with this premise is, of course, irrelevant since as pertains here there is no federal regulation of nonpoint source pollution under the CWA.

[9] *See, e.g.*, *State of Oklahoma v. Federal Energy Regulatory Commission*, 661 F.2d 832, 840 (10th Cir. 1981) (addressing delegated regulatory program under the Natural Gas Policy Act and explaining that "the NGPA simply allows the states to participate in the administration of the Act. There [the Surface Mining Act], as here, '(i)f a State does not wish to submit a proposed permanent program . . . , the full regulatory burden will be borne by the Federal Government'"); *Lankford v. Sherman*, 451 F.3d 496, 511 (8th Cir. 2006) (addressing Medicaid and stating that "[w]hen a state receives federal matching funds, its medical assistance program must comply with all federal statutory and regulatory requirements").

room' for supplementary state regulation.'" *International Paper*, 107 S.Ct. at 811 (citation omitted).

**2. The Arkansas-Oklahoma Arkansas River Basin Compact does not pre-empt the State's claims as to the Poultry Integrator Defendants' conduct occurring in Arkansas and causing injury in Oklahoma**

Peterson's position that the Arkansas-Oklahoma Arkansas River Basin Compact pre-empts the State's claims as to the Poultry Integrator Defendants' conduct occurring in Arkansas and causing injury in Oklahoma is, as pointed out in the State's response to Peterson's motion to dismiss / stay [Dkt. No. 134], p.13, fn 5, not even the same as the position Arkansas recently took before the United States Supreme Court. As reflected by its proposed Bill of Complaint attached to its petition before the United States Supreme Court, Arkansas' position was not that the Compact pre-empts the State's claims, but rather that the administrative processes of the Compact should be exhausted prior to litigation. *See* "Defendants' Motion to Stay Proceedings and Integrated Opening Brief in Support and Request for Expedited Hearing" [Dkt. No. 125], Exhibit A, p. 16; *see also* "Defendants' Motion to Stay Proceedings and Integrated Opening Brief in Support and Request for Expedited Hearing" [Dkt. No. 125], p. 4 (describing Arkansas petition in terms of primary jurisdiction). The United States Supreme Court declined to exercise original jurisdiction over this matter. *See Arkansas v. Oklahoma*, 126 S.Ct. 1428 (2006).

Indeed, in its response to Peterson's motion to dismiss / stay, pp. 13-7, the State cited to sections of the Compact that make it clear that the Compact specifically endorses the use of state and federal pollution control laws by the State, *see* 82 Okla. Stat. § 1421 (Art. VII(E)), and that there is no requirement that the State proceed before the Compact Commission before asserting its rights in court, *see, e.g.*, 82 Okla. Stat. § 1421 (Art. IX(A)(8)). Against this backdrop as well, it is impossible to conclude that the "federal legislation is 'sufficiently comprehensive to make

reasonable the inference that Congress 'left no room' for supplementary state regulation.'" *International Paper*, 107 S.Ct. at 811 (citations omitted). Nowhere in the Compact did the State of Oklahoma give the State of Arkansas a veto over its sovereign right to take judicial action to protect its public and its environment.

Yet Peterson continues to rehash this meritless argument. In its Proposed Sur-Reply, pp. 15-6, Peterson first cites to hortatory language in the CWA stating that the "[t]he Administrator shall . . . encourage compacts between States for the prevention and control of pollution" as support for its pre-emption argument. *See* 33 U.S.C. § 1253(a) (emphasis added). Aspirational or hortatory language does not reflect an intent to pre-empt. *See, e.g., Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990). In its flawed pre-emption argument, Peterson then goes on to misstate that "[t]he word 'mutual' is used throughout the [Compact]." Proposed Sur-Reply, p. 16. This is incorrect. The word "mutual" appears nowhere in the Compact. The phrase used in the Compact is "mutually agree," and it is used in three instances in the Compact. *See* 82 Okla. Stat. § 1421 (Art. VII ("The States of Arkansas and Oklahoma mutually agree to . . .", VIII(F) (The states hereby mutually agree to appropriate sums sufficient to cover its share of the expenses incurred in the administration of this Compact . . ."), & XIII ("The States of Arkansas and Oklahoma mutually agree and consent to be sued in the United States District Court . . ."). In each instance the phrase has the meaning "both agree."[10]

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[10] That this is what the term "mutually agree" means is plainly evident by reading the entirety of 82 Okla. Stat. § 1421 (Art. VII):

> The States of Arkansas and Oklahoma mutually agree to:
>
> A. The principle of individual state effort to abate man-made pollution within each state's respective borders, and the continuing support of both states in an active pollution abatement program;

It does not mean "only with joint action." Peterson's argument that the Compact pre-empts any part of the State's claims must therefore fail.

### 3. The State's claims against the Poultry Integrator Defendants should not be stayed under the doctrine of primary jurisdiction

Peterson's contention that "the language of the CWA illustrates that Congress envisioned the several state's attorney generals to have only a minor, advisory role in the water quality issues addressed in the CWA legislation," *see* Proposed Sur-Reply, p. 18, is without foundation. First, as detailed above, as pertains to nonpoint source pollution, the CWA does not regulate; rather the CWA leaves regulation of nonpoint source pollution up to the states. To contend then that the CWA dictates the role of the Attorney General with respect to Oklahoma's regulation of nonpoint source pollution is thus wholly unsupportable.

Second, Oklahoma law plainly contemplates an active role by the Attorney General, acting on behalf of the State, in water quality issues. As explained in previous briefing,[11] the

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> B. The cooperation of the appropriate state agencies in the States of Arkansas and Oklahoma to investigate and abate sources of alleged interstate pollution within the Arkansas River Basin;
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> C. Enter into joint programs for the identification and control of sources of pollution of the waters of the Arkansas River and its tributaries which are of interstate significance;
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> D. The principle that neither state may require the other to provide water for the purpose of water quality control as a substitute for adequate waste treatment;
>
> E. Utilize the provisions of all federal and state water pollution laws and to recognize such water quality standards as may be now or hereafter established under the Federal Water Pollution Control Act in the resolution of any pollution problems affecting the waters of the Arkansas River Basin.

Peterson's proposed reading, on the other hand, would render this section non-sensical.

[11] *See* "Plaintiff's Response in Opposition to 'Peterson Farms, Inc.'s Motion to Dismiss and, or in the Alternative, Motion to Stay Proceedings Pending Appropriate Regulatory Agency Action'" [Dkt. # 134], "State of Oklahoma's Supplemental Brief in Opposition to Peterson Farms, Inc.'s Motion to Dismiss and Alternative Motion to Stay the Proceedings" [Dkt.

Attorney General has both common law and statutory authority to bring actions on behalf of the State directly in court -- without first exhausting administrative remedies -- in instances where, for example, the interests of the State of Oklahoma are implicated or where violations of Oklahoma statutes have occurred. *See, e.g.*, "Plaintiff's Response in Opposition to 'Cobb-Vantress, Inc.'s Motion to Dismiss Counts Four, Six, Seven, Eight, Nine and Ten of the First Amended Complaint or, Alternatively, to Stay the Action'" [Dkt. # 133]. For example, and without limitation, the Attorney General has the authority to bring actions on behalf of the State in court to protect Oklahoma's waters directly. *See, e.g.*, 74 Okla. Stat. § 18b & 82 Okla. Stat. § 1084.1. Under the Environmental Quality Code and the Agricultural Code, the Attorney General likewise has the authority to bring actions on behalf of the State directly in court for violations of Oklahoma statutes. *See, e.g.*, 2 Okla. Stat. § 10-9.11; 27A Okla. Stat. § 2-3-504; 2 Okla. Stat. § 20-26; & 2 Okla. Stat. § 2-16. Against this backdrop of authority, to claim that the doctrine of primary jurisdiction is applicable and warrants a stay of this action is without merit.

Third, as demonstrated above, nothing in the Compact precludes this action. In fact, the Compact specifically endorses the use of state and federal pollution control laws by the State, *see* 82 Okla. Stat. § 1421 (Art. VII(E)), and has no requirement that the State proceed before the Compact Commission before asserting its rights in court, *see, e.g.*, 82 Okla. Stat. § 1421 (Art. IX(A)(8)). Thus, here, too, a claim that the doctrine of primary jurisdiction applies and warrants a stay of this action is without merit.

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# 869], "State of Oklahoma's Response in Opposition to 'Cobb-Vantress, Inc.'s Motion to Dismiss Counts Four, Six, Seven, Eight, Nine and Ten of the First Amended Complaint or Alternatively to Stay the Action'" [Dkt. #133], and "State of Oklahoma's Supplemental Brief in Opposition to 'Cobb-Vantress, Inc.'s Motion to Dismiss Counts 4,6,7,8, 9 and 10 of the First Amended Complaint or Alternatively to Stay the Action'" [Dkt. #868].

Simply put, the purpose of this lawsuit is to protect Oklahoma's environment. Addressing the pollution caused by the Poultry Integrator Defendants is consistent with and furthers the aims of Oklahoma law and the Compact. It also furthers the work of the Oklahoma agencies. Nothing in Oklahoma law or the Compact requires the State to first exhaust administrative remedies before proceeding to court to hold environmental polluters responsible.

## II. Conclusion

WHEREFORE, premises considered, "Peterson Farms, Inc.'s Opposed Motion for Leave to File Sur-Reply on Its Motion to Dismiss" [Dkt. # 973] should be denied or alternatively, in the event Peterson's Motion for Leave is granted, the State should be provided the opportunity to respond to the matters raised in Peterson's Proposed Sur-Reply.

Respectfully Submitted,

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